National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 18, 1996

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Roseburg Forest Products, Case 36-CA-7654

530-6067-6001-3700, 530-6067-6062, 530-6067-6067-5267, 530-6067-6067-8150

This case was submitted for advice for consideration of the issue of whether an Employer can refuse to supply a Union with requested information needed to process a grievance by raising a defense that it is prohibited from doing so under ADA.

FACTS

The Union and the Employer are party to a collective-bargaining agreement effective December 10, 1992 through June 1, 1996. Article 6 contains a grievance procedure; however, it does not contain an arbitration clause.

Article 8 of the contract contains seniority provisions including the right of individuals to bid for and receive jobs based on seniority provided they are qualified to perform the job.

On March 15, 1995, the Employer posted two job bids for the position of day shift hardwood veneer sorter at its plywood plant. Approximately twenty employees placed bids for these positions which were awarded approximately one week later. One of the two positions was filled by the most senior qualified job bidder. The second position was awarded to employee Gary Booze despite the fact that several qualified applicants with more seniority than Booze had bid for the position.

On March 31, 1995, an employee named Robert Cofer filed a grievance with the Union challenging the selection of Booze for the position. Cofer was the second most senior bidder for the position and no dispute exists that Cofer was qualified to perform the job.

On April 14, 1995, a second step grievance meeting was convened concerning the grievance filed by Cofer regarding the awarding of the bid job to Booze.

At the meeting, the Union took the position that the Company had violated the contract by awarding the job to Booze out of seniority. The Company responded that Booze was awarded the job based upon a medical condition and upon the recommendation of Booze's physician. The Company further stated that it felt it was required to award Booze the job under the A.D.A.[1] The Union then responded that the Company could have made some other accommodation than placing Booze in the disputed position. This meeting ended without resolution of the grievance.

On June 28, 1995, a third step grievance meeting was convened on the grievance and again no resolution was reached.

On July 21, 1995, Michael Garone, the Union attorney, contacted Employer attorney Nelson Atkin by phone. At that time, Garone requested that the Company supply the Union with the necessary medical information regarding Booze's disability so the Union could assess the grievance. After reviewing the collective-bargaining agreement and the ADA, Atkin wrote Garone on July 21, 1995 advising Garone the Employer could not release the requested information under ADA. While the Employer has expressed a willingness to supply the requested information if the union could obtain a written release from Booze, the union has been unable to gain such consent.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unlawfully refusing to furnish the Union with the requested medical information.

1. EEOC's Position

Pursuant to a Memorandum of Understanding with the EEOC, this issue was sent to the EEOC on November 2, 1995 because it raised an issue concerning the application of the ADA. The EEOC responded to our inquiry by letter dated November 1, 1996.[2] The EEOC takes the position that:

- Title 1 defines "covered entity" to include both employers and labor organizations. "As such, a union, in its role as designated exclusive bargaining representative of the collective work force, has a reasonable accommodation obligation under the ADA. When an employer seeks to provide a reasonable accommodation that conflicts with collectively bargained seniority rules, the Commission's position is that the substance of a union's reasonable accommodation obligation is to negotiate with the employer to provide a variance with the CBA, if no other reasonable accommodation exists and the proposed accommodation does not unduly burden non-disabled workers or otherwise pose an undue hardship".[3]

- "To meets its ADA reasonable accommodation obligation, a union may make inquiries necessary to the reasonable accommodation process."

- "Medical information necessary to the reasonable accommodation process may be shared between an employer and union to meet their ADA reasonable accommodation obligations to a particular individual." However, "medical information may be given to and used by appropriate decision-makers involved in the hiring process to enable them to make employment decisions consistent with the ADA. Medical information may be shared only with individuals involved in the hiring process who have a need to know the information. Under these specific circumstances, the confidentiality provisions of Title 1 of the ADA are not violated."

- Under Title 1 of the ADA, a union is required to keep all medical information confidential.

- A bargaining unit member who files a grievance challenging the provision of an ADA reasonable accommodation to an individual with a disability is not a decision-maker or necessary consultant regarding the accommodation, and thus may not be given any medical information about the disabled individual."

Applying the above principles to the instant case, the EEOC concluded that the ADA permits the Employer to give the Union medical information in the Employer's possession that is necessary to the accommodation process. The EEOC further concluded that "[i]f the need for accommodation is not obvious, the Employer may share documentation showing that the employee has an ADA-covered disability, and stating the related functional limitation that necessitate the accommodation. Medical information may only be shared with individuals with a need to know the information who are decision-makers or necessary consultants regarding the accommodation."

2. Board Law

A union is generally entitled to information that is relevant to its collective-bargaining responsibilities, including grievance processing.[4] However, in Detroit Edison,[5] the Supreme Court held that a union's interest in arguably relevant information does not always predominate over all other interests. Specifically, the Court found that when an employer asserts a legitimate interest in maintaining confidentiality, the employer may condition the disclosure of the information.[6] Subsequent to Detroit Edison, the Board has held that information about an employee's medical condition is confidential.[7] Further, the Board has held that:

...in dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but

blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.[8]

3. Discussion

In the instant case, although the requested medical information as to Booze's disability is relevant to the Union in assessing its grievance, the Employer has asserted a legitimate confidentiality interest in refusing to supply the information. However, the Employer has failed to propose any accommodation. Rather, the Employer has refused to supply the medical information unless Booze gives his permission. This is not an accommodation. Thus, the Employer has failed to meet its bargaining obligation to provide relevant information to the Union.

We further conclude that the Union and the Employer should be given a copy of the EEOC's November 1 letter (attached). As part of the Employer's accommodation obligations, the Employer can rely on the EEOC's requirements that: the medical information may only be shared with individuals with a need to know the information who are decision-makers or necessary consultants regarding the accommodation; and that the information that the Employer is required to share with the Union is strictly limited to that which is necessary for the Union to fulfill its role in the accommodation process.

Finally, we conclude that if any subsequent 8(a)(5)-8(d) charge is filed concerning the Employer's changing any contractual provision (i.e. seniority) for ADA accommodation purposes, the case should be resubmitted for advice.

B.J.K. Attachment

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[1] During the investigation the Company provided information stating that Booze was injured on the job on December 17, 1993 and while undergoing treatment for that injury another medical condition was discovered precluding his return to normal duties.

[2] See attached letter.

[3] This requirement is not supported by many circuit courts of appeals. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) (concluding that the ADA does not require reasonable accommodations that violate seniority rights in a collective-bargaining agreement). We don't need to address this position since this issue is not presented at this point. If any subsequent 8(a)(5)-8(d) charge is filed concerning the employer's changing any contractual provision (i.e. seniority) for ADA accommodation purposes, the case should be submitted to Advice.

[4] See NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[5] 440 U.S. 301, 318 (1979).

[6] Id. at 318-320.

[7] See e g. Bacardi Corp., 296 NLRB 1220, 1223 (1989), and cases cited.

[8] Pennsylvania Power Co., 301 NLRB 1104, 1105-06 (1991).